Carrier (M) Sdn Bhd v Kemajuan Amoy Bhd

HIGH COURT (KUALA LUMPUR) — COMPANIES WINDING UP NO D8–28–464 OF 2006
KANG HWEE GEE J
3 JULY 2008

Companies and Corporations — Winding up — Petition — Statutory notice — Defective — Appropriate address — Service at business address and not company's registered address — Whether injustice caused by service of notice at business address — Companies Act 1965 s 281(2)(a)

The respondent had applied to set aside the statutory notice under s 218(2)(a) of the Companies Act 1965 ('Act') and further, to strike out the petition to wind up the company filed by the petitioner due to the inability to pay its debt pursuant to s 218(1)(e) of the said Act. They contended that the service of the statutory notice was fatally defective as it was served on the respondent at its business address and not at its registered address. The issue before the court was whether the statutory notice served at the business address and not at the registered address of the company constituted a good service for the purpose of s 218(2)(a).

Held, dismissing the application with costs:

(1) The petitioner's process server's affidavit showed that he had attempted to serve the notice at its registered address but had found the place empty. There was no sign or indication that the place was the registered address of the respondent. In this case, no injustice had been caused by the service of the notice at the business address. On the contrary, had the notice been left at the vacant space which the respondent had specified as its registered address, no warning of the impending petition would have been received by the respondent (see paras 22–23).

(2) The fact remained that the respondent received the statutory notice although it was served at its business address and had responded to the petition by making this application to set aside this petition (see para 24).

(3) The consideration would be different where a service is effected on a company's business address and had not been brought to the notice of the company and a winding up order was made in consequence. The

court would, in this situation, be apt to find the service of the notice invalid for non-compliance with a component provision of s 218(2)(a) (see para 25).

[Bahasa Malaysia summary

Responden telah memohon untuk mengetepikan notis statutori di bawah s 218(2)(a) Akta Syarikat 1965 ('Akta') dan seterusnya, membatalkan petisyen untuk menggulung syarikat yang difailkan oleh pempetisyen disebabkan ketidakupayaan untuk membayar hutangnya menurut s 218(1)(e) Akta tersebut. Mereka menegaskan bahawa penyampaian notis statutori adalah defektif kerana ia disampaikan kepada responden di alamat perniagaannya dan bukan alamat berdaftarnya. Isu di hadapan mahkamah adalah sama ada notis statutori yang disampaikan di alamat perniagaan dan bukan alamat berdaftar syarikat membentuk penyampaian yang betul bagi tujuan s 218(2)(a).

Diputuskan, menolak permohonan dengan kos:

(1) Proses penyampaian afidavit pempetisyen menunjukkan dia telah cuba menyampaikan notis itu di alamat berdaftar tetapi mendapati tempat itu kosong. Tiada tanda yang tempat itu adalah alamat berdaftar responden. Dalam kes ini, tiada ketidakadilan disebabkan penyampaian notis ke alamat perniagaan itu. Sebaliknya, jika notis itu dibiarkan di tempat kosong yang telah ditetapkan oleh responden, responden tidak akan menerima amaran tentang penyampaian petisyen itu (lihat perenggan 22–23).

(2) Hakikatnya responden telah menerima notis statutori itu meskipun ia disampaikan ke alamat perniagaannya dan telah membalas petisyen itu dengan membuat permohonan ini untuk mengetepikan petisyen ini (lihat perenggan 24).

(3) Pertimbangan adalah berbeza jika penyampaian dibuat ke alamat perniagaan syarikat dan tidak dibawa kepada perhatian syarikat dan akhirnya perintah penggulungan dibuat. Dalam keadaan ini, mahkamah akan segera mendapati penyampaian notis itu tidak sah kerana ketidakpatuhan dengan komponen peruntukan s 218(2)(a) (lihat perenggan 25).]

Notes

For cases on petition, winding up, see 3(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1321–1456.

Cases referred to

Cymun Development Sdn Bhd lwn Supermax Sdn Bhd [1995] 2 MLJ 233 (refd)

Dayakuasa Holdings Sdn Bhd v Kayaal Holdings Sdn Bhd [2003] 2 MLJ 263 (refd)

Ho Siew Choong & Ors v Everworth Sdn Bhd [2005] 2 CLJ 273 (refd)

Malaysia Air Charter Co Sdn Bhd v Petronas Dagangan Sdn Bhd [2000] 4 MLJ 657 (refd)

Malaysia Air Charter Co Sdn Bhd v Petronas Dagangan Sdn Bhd [2000] 2 MLJ 98 (refd)

Masboh Trading Sdn Bhd v Mejaris Builders Sdn Bhd [2001] 5 MLJ 369 (refd)

Mikien Sdn Bhd v Woolley Development Sdn Bhd [2008] 1 MLJ 823 (refd)

Sri Hartamas Development Sdn Bhd v MBf Finance Bhd [1992] 1 MLJ 313 (refd)

United Malayan Banking Corp Bhd v Richland Trade & Development Sdn Bhd [2000] 1 MLJ 385 (refd)

Legislation referred to

Companies Act 1965 ss 218, 218(2)(a), 218(1)(e), 355(1), 355(2)

Rules of the High Court 1980 O 14

Peter-Douglas Ling (Raja Darryl & Loh) for the petitioner.

SS Tugal (Harjit Singh with him) (Harjit & Co) for the respondent.

Kang Hwee Gee J:

[1] This is a motion by the respondent to set aside the statutory notice under s 218(2)(a) of the Companies Act 1965 and to strike out the petition filed by the petitioner to wind up the company on account of it being unable to pay its debt pursuant to s 218(1)(e) of the Companies Act 1965 on the specific ground that the service of the statutory notice under s 218(2)(a) was fatally defective as it was served on the respondent at its business address and not at its registered address.

MR SS TUGAL FOR THE RESPONDENT (MR HARJIT SINGH WITH HIM)

[2] The statutory notice in this case was not served in accordance with s 218(2)(a) which read as follows:

(2) A company shall be deemed to be unable to pay its debts if —

(a) a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding five hundred ringgit then due has served on the company *by leaving* at the *registered office* a demand under his

hand or under the hand of his agent thereunto lawfully authorised requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor.

[3] The Supreme Court in the case *Sri Hartamas Development Sdn Bhd v MBf Finance Bhd* [1992] 1 MLJ 313 at p 318 has ruled that this s 218(2)(a) is mandatory:

> It was made in writing and was signed and delivered by the respondents' authorised agent at the appellants' registered address and it has specified the actual sum due which was not disputed. Section 218(2)(a) of the Act only provides that *a demand under the hand of a creditor or under the hand of his agent lawfully authorised must be served on the company by leaving the said document at its registered address* requiring the company to pay the sum due. The presumption of inability to pay its debts only arises if the requirements of the section relating to the demand have been complied with, and the company has for three weeks after service of the demand neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor.

[4] This was confirmed in the Federal Court's case, *United Malayan Banking Corp Bhd v Richland Trade & Development Sdn Bhd* [2000] 1 MLJ 385 at p 388H–I:

> In order for the demand to be effective, however, it must comply strictly with certain requirements as stipulated in the sub-section itself. The requirements are that the demand must be in writing under the hand of the creditor or his authorised agent, it must specify the sum due (no mention is made of quantifying it to the last cent). The demand must be served on the company by leaving it at the registered office. If these requirements are met, I am of the view that the demand is valid and if after three weeks the company fails to pay the amount I demanded then the law deems it to be unable to pay its debts whereupon a winding up petition would follow.

And at p 389:

> We agree with the views expressed by the Court of Appeal on this point. They would then have allowed the appeal but for another issue raised by learned counsel for the respondent which was not raised in the High Court.

[5] The Court of Appeal's case in *Malaysia Air Charter Co Sdn Bhd v Petronas Dagangan Sdn Bhd* [2000] 2 MLJ 98 at pp 102 and 103 followed the *Sri Hartamas* and the *United Malayan Banking Corp* cases:

> The Supreme Court while endorsing that s 218(2)(a) ought to be strictly interpreted went on to say that a demand does not fall within s 218(2)(a) if the amount demanded exceeds the sum actually due, and held that in that case the

statutory demand was not bad or invalid, as it was made in writing and was signed and delivered at the registered address of the appellant and it had specified the actual amount due … Since the notice in the present appeal is similar with that in *Sri Hartamas*, we hold that the notice, although it did not quantify the interest due, was made in writing and was signed and delivered by the respondent's authorised agent at the appellant's registered address and it has specified the actual sum due which was not disputed, was a good and valid notice. Section 218(2)(a) only provides that a demand under the hand of the creditor or under the hand of his agent lawfully authorised, must be served on the company by leaving the said document at its registered address requiring the company to pay the sum due. It is our view that it makes no difference whether the interest is quantified or not.

A similar situation arose in *United Malayan Banking Corp Bhd v Richland Trade & Development Sdn Bhd* (unreported) where the Court of Appeal, following the Supreme Court's decision in *Sri Hartamas*, adopted the strict interpretation and held that the failure to quantify the interest does not render the demand of its real purpose and objective. The Court of Appeal further held that:

> In order for the demand to be effective, however, it must comply strictly with certain requirements as stipulated in the sub-section itself. … The demand must be served on the company by leaving it at the registered office. If these requirements are met, I am of the view that the demand is valid and if after three weeks the company fails to pay the amount demanded then the law deems it to be unable to pay its debts whereupon a winding up petition would follow.

The decision on the interpretation of s 218(2)(a) in the *Richland*'s case was affirmed by the Federal Court at its sitting on 21 October 1999 though the appeal was allowed on a different ground, ie on the issue of the service of the notice of demand (see *United Malayan Banking Corp Bhd v Richland Trade & Development Sdn Bhd* [2000] 1 MLJ 385).

[6] All the above cases emphasised that in order for the notice to be valid there must be strict compliance with s 218(2)(a).

[7] See *Ho Siew Choong & Ors v Everworth Sdn Bhd* [2005] 2 CLJ 273 at pp 280–281:

> Since this petition is founded on the statutory notice under s 218, any defect in that notice is fatal. It is prejudicial to the respondent as they are put to a disadvantage …
>
> This notice of statutory demand is defective. Therefore, the statutory demand is infirmed and cannot be used as a foundation to launch the petition.
>
> Service of the Statutory Demand
>
> ...
>
> The petitioners' case is that the demand had been sent by AR registered mail and by courier service to the address therein stated. Is that sufficient for the purpose of s 218(2)(a) Companies Act 1965, which provides that the same is to be 'served on the company by leaving at the registered office'.

I do conclude that the demand has not been 'served on the company by leaving at the registered office'. In so holding. I follow the decision in *Dayakuasa Holdings Sdn Bhd v Kayael Holdings Sdn Bhd* [2003] 2 CLJ 391 where His Lordship Low Hop Bing J stated:

> Since the statutory demand was merely sent by registered post to the respondent's registered office, but was not served on the respondent by leaving it at the registered office, it seems clear to me that the strict requirement of s 218(2)(a) has not been complied with by the petitioner.

I refer to a Federal Court case of *Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor* [1996] 2 CLJ 586 it was held:

> Sending a notice is a far cry from serving one …

I now pause to note the importance of the statutory notice of demand. That demand carries with it a very drastic consequence for a respondent company. Failure to pay in accordance to that demand triggers off the deeming provision that the company is unable to pay its debts. The inability to pay its debt is one of the grounds for which a company may be wound up — as provided for under s 218(1)(e) of the Companies Act 1965.

Now, in order for the petitioners to bring into effect that deeming provision, it is incumbent for the petitioners to comply strictly with the pre-requisite of that provision. If there is any doubt whether the requisite and proper demand had been given to that company, then I am inclined to think that I ought to hold that the petitioners have failed to bring into effect those deeming provisions. This is so especially in view of the very dire and drastic consequences of the default of compliance of such a demand.

[8] The provision in the s 218(2)(a) is a special and specific provision requiring strict compliance.

[9] On the alternative prayer — application for stay of the winding up proceeding (encl 1) pending the disposal of counterclaim by Civil 5 S5–22–109 of 2005 on which the petition on the O 14 judgment was based. The summary judgment in that case had been stayed. It would therefore be appropriate that the court hear the winding up petition after the disposal.

MR PETER-DOUGLAS LING FOR THE PETITIONER

[10] The s 218 provision on notice may ex facie appears to be strict but case law seems to suggest that s 218(2)(a) should be interpreted widely and liberally. See *Malaysia Air Charter Co Sdn Bhd v Petronas Dagangan Sdn Bhd* [2000] 4 MLJ 657 on appeal to Federal Court at pp 667–668 per Mohamed Dzaiddin FCJ:

From the Australian authorities which we have examined, it is clear to us that there exists a conflict of decisions with respect to the interpretation of the provisions of their equivalent to our s 218(2)(a) of the Act on the question whether the statutory demand is valid if it claims an amount in excess of that due by the company. Waddel J in *Processed Sand*, supported by Heerey J in *Ataxtin* adopted the literal interpretation and held that an excess claim makes the demand invalid. On the other hand, *Re Pardoo*, which was approved at the appellate level by the Full Court of Victoria in *Re Fabo* took the liberal approach, whose reasoning was followed by at least two Singapore High Court decisions.

After analysing the authorities, we would prefer the reasoning and conclusion of the Full Court of Victoria in *Re Fabo* that the court should adopt a liberal interpretation when considering the provisions of s 218(2)(a) of the Act. We have earlier set out the reasons of the Full Court for adopting a liberal interpretation and their considerations that the adoption of a literal interpretation would be difficult. We would reiterate here that we agree with *Re Fabo* that a literal interpretation of the section would compel the court *not* to make a winding up order notwithstanding the existence of clear evidence that an undisputed sum due exceeding RM500 has remained unpaid after a demand made without any reasonable explanation for the failure to pay. In the instant case, the statutory demand required the appellant to pay the respondent the judgment sum of RM334,118.79 together with interest at 8% per annum etc as at the date of the notice. From the evidence, the aforesaid sum remained unpaid. Thus, if we were to interpret the section literally or strictly, it means no winding up order could be made as the exact amount due as at the date of the notice has not been quantified, notwithstanding that the debt exceeded RM500 and remained unpaid. By contrast, the liberal interpretation would permit the court, if proved to its satisfaction, to make a winding up order.

[11] See *Masboh Trading Sdn Bhd v Mejaris Builders Sdn Bhd* [2001] 5 MLJ 369 with specific reference to the service of notice under s 218(2)(a) at p 372:

My basis for thinking that sub-s (2)(a) must be complied with such strictness is now demolished with the citing by learned counsel for the petitioners of *Malaysia Air Charter Co Sdn Bhd v Petronas Dagangan Sdn Bhd* [2000] 4 MLJ 657, where the Federal Court, at p 668, said this:

> It should however be borne in mind that s 218(2)(a) does not create separate grounds for winding up, but provides a mode of proof available in aid of an application seeking a winding up on the ground specified in s 218(1), viz, that the company is unable to pay its debts (*Ataxtin*). A company will not be wound up, even if it fails to heed a valid notice, if it can establish by independent evidence that it is solvent (*Re Fabo*).

It means that the 'deeming' is a presumption that is rebuttable.

To hold that failure to serve the statutory demand on a company by leaving it at the registered office will inhibit the deeming of inability to pay its debts even though it did receive the demand by service otherwise and yet failed to satisfy it

would run contrary to reason and good sense and would be justified, if at all, only if the deeming is irrebuttable. Since according to the Federal Court the deeming is rebuttable, a rational approach to the requirement of service of the statutory demand at the registered office is called for, and the rational approach is to treat the requirement as no more than a prescribed method of service that is legally foolproof but default in the observance of which is not prejudicial to the deeming if the company did in fact receive the statutory demand by service by some other means or at some other place.

[12] See *Cymun Development Sdn Bhd lwn Supermax Sdn Bhd* [1995] 2 MLJ 233, at p 237:

Tujuan keseluruhan permintaan atau tuntutan itu ialah memberi amaran kepada responden mengenai petisyen penggulungan itu. Dalam kes ini permintaan itu dibuat secara bertulis dan ditandatangani dengan menyebutkan jumlah sebenar kena dibayar. Walaupun permintaan itu ditinggalkan di pejabat perniagaan, ianya telah diterima oleh responden dan responden telah memasukkan memorandum kehadiran. Adalah nyata daripada k 194(1) Kaedah-Kaedah (Penggulungan) Syarikat 1972 bahawa tiada sebarang ketidakadilan penting telah berlaku di sini disebabkan permintaan itu telah dihantar ke pejabat perniagaan.

Therefore service of the s 218 notice is valid.

[13] On the stay order of the judgment obtained. The stay does not bind this honourable court. Winding up proceedings is an action in rem as opposed to an action in personam. The action in this winding up is not for the benefit of the petitioner only but for all the creditors. The stay is merely for the execution of judgment and not for the purpose of presenting the winding up petition.

[14] The *Malaysia Air Charter Co Sdn Bhd* was appealed to the Federal Court and the Federal Court at [2000] 4 MLJ 657 had reversed the decision of the Court of Appeal with respect to the point of whether s 218(2)(a) ought to be construed widely and liberally and not narrowly and strictly.

[15] The same decision was arrived at in *Cymun Development Sdn Bhd v Supermax Sdn Bhd* as in *Masboh Trading Sdn Bhd v Mejaris Builders Sdn Bhd* that a statutory notice served at the business address was valid. See also the case of *Mikien Sdn Bhd v Woolley Development Sdn Bhd* [2008] 1 MLJ 823.

REPLY BY MR SS TUGAL (MR HARJIT SINGH WITH HIM)

[16] The Federal Court in *Malaysia Air Charter* was dealing with the issue of quantum whether the amount claimed under the statutory notice should be quantified. That was the same issue before the Court of Appeal. The issue

here before us is whether the statutory notice is served in accordance with s 218(2)(a) as to constitute a good service. In the *Sri Hartamas* case the issue is on the adequacy of notice requirement of 21 days. In *United Malayan Banking Corp* the issue was on the service of the *petition* at the old business address and at p 388H–I it is clearly stated that in order for the demand to be effective, it must comply strictly with certain requirements as stipulated in the subsection itself:

> The requirements are that the demand must be in writing under the hand of the creditor or his authorised agent, it must specify the sum due (no mention is made of quantifying it to the last cent). The demand must be served on the company by leaving it at the registered office.

[17] There are also High Court decisions interpreting s 218(2)(a) to say that the service of the statutory notice must be served at the registered address and nowhere else. See *Dayakuasa Holdings Sdn Bhd v Kayaal Holdings Sdn Bhd* [2003] 2 MLJ 263 per Low Hop Bing J (as he then was) where it was held that a statutory notice posted by registered post to the registered address was insufficient — a fortiori where it is served at the business address. In the case of *Ho Siew Choong & Ors v Everworth Sdn Bhd* per Apandi Ali J held at p 280 that a service of the statutory notice by courier service was insufficient following *Dayakuasa*. The two High Court cases cited herein are directly on point that a statutory notice must be served at the registered address.

FINDINGS AND DECISION

[18] The Supreme Court in *Sri Hartamas Development* and the Federal Court in *United Malayan Banking Corp* and in *Malaysia Air Charter* are all not decisions on whether a statutory notice served at the business address and not at the registered address of the company can be accepted as good service for the purpose of s 218(2)(a) of the Companies Act 1965.

Sri Hartamas is concerned with the question of the adequacy of notice requirement of 21 days; *United Malayan Banking Corp* with the service of the petition at the old business address and *Malaysia Air Charter* with the question of whether the amount claimed under the statutory notice should be quantified to the last cent.

[19] The three cases of the highest court of our land are therefore not authorities that the statutory notice must be served on the registered office of the respondent.

[20] It is true that Chong Siew Fai CJ (Sabah and Sarawak) did say in *United Malayan Banking Corp Bhd*, that '*in order for the demand to be effective,*

however, it must comply strictly with certain requirements as stipulated in the subsection itself, one of which is that the demand must be served on the company by leaving it at the registered office. His Lordship did not go so far to consider whether a service of the demand at the business premises of the company is bad and assailable and whether such defect can be cured under s 355(1) and (2) of the Companies Act 1965 which read as follows:

> (1) No proceeding under this Act shall be invalidated by any defect irregularity or deficiency of notice or time unless the Court is of opinion that substantial injustice has been or may be caused thereby which cannot be remedied by any order of the Court.
>
> (2) The Court may if it thinks fit make an order declaring that the proceeding is valid notwithstanding any such defect irregularity or deficiency.

[21] The statutory notice it is to be noted, was in fact received by the respondent although it was served at its business address. The petitioner's process server's affidavit shows that he attempted to serve the notice at its registered address but had found the place empty. There was no sign or indication that the place was the registered address of the respondent. The purpose of service of the statutory notice as Faiza Tamby Chik J said in *Cymun Development*, is purely to warn the respondent of the winding up petition:

> Tujuan keseluruhan permintaan atau tuntutan itu ialah memberi amaran kepada responden mengenai petisyen penggulungan itu.

[22] I am convinced that no injustice has or may be caused by the service of the notice at the business address. On the contrary had the notice been left at the vacant space which the respondent had specified as its registered address, no warning of the impending petition would be received by the respondent.

[23] The fact remains that the respondent did receive the statutory notice and had responded to the petition by making this application to set aside this petition.

[24] The consideration would be different where a service is effected on a company's business address and had not been brought to the notice of the company and a winding up order was made in consequence. The court would under the circumstances be apt to find the service of the notice invalid for non-compliance with a component provision of s 218(2)(a).

[25] The motion (prayer 1) is dismissed with costs.

Application dismissed with costs.

Reported by Ashgar Ali Ali Mohamed